

Chapter 21

Review of USOR Determinations Appeals & Due Process Procedures

21.1 Authority: 34 CFR 361.57

21.2 Policy

USOR policy requires that applicants and eligible individuals are informed of dispute resolution and due process procedures, including the availability of the Client Assistance Program, throughout the VR process. Applicants and eligible individuals or, as appropriate, the individual's representative may request a timely review of any USOR staff determination that affects the provision of VR services. The purpose of this chapter is to specify how review and adjudicative proceedings are conducted under state and federal VR code and regulations administered by the Utah State Board of Education. VR Counselors should utilize their professional counseling skills to resolve disputes and maintain positive VR Counselor-Client relationships to the fullest extent possible. (See Chapter 11)

21.3 Definitions

"Applicant/client" means any individual applying for or having been found eligible for Utah State Office of Rehabilitation VR services.

"Board" means the Utah State Board of Education.

"Client Service Director" means the DRS Home Office Director overseeing the provision of VR client services, and direct supervisor of Field Service Director positions within the Division of Rehabilitation Services.

"VR Counselor" means any Utah State Office of Rehabilitation VR Counselor.

"Days" means calendar days.

"Director" means the Director of the Division of Rehabilitation Services or the Director of the Division of Services for the Blind and Visually Impaired.

"Division" means the Division of Rehabilitation Services or Division of Services for the Blind and Visually Impaired.

"Executive Director" means the Executive Director of the Utah State Office of Rehabilitation.

"Field Service Director" means the DRS Home Office level positions supervising the VR districts and their District Directors under the Coordinator of Client Services of the Division of Rehabilitation Services.

"Fair Hearing" means the requirement for adjudicative proceedings under the Rehabilitation Act.

"Formal Review" means the procedures established by the Executive Director for any applicant or client receiving VR services who is dissatisfied with any determination(s) made by a VR Counselor or supervisor concerning the furnishing or denial of services to have a timely review of those determinations.

"Impartial Hearing Officer" means an individual not employed by USOR who conducts the Fair Hearing and renders a decision without bias according to the provisions of the approved Utah State Plan for Vocational Rehabilitation and the Rehabilitation Act.

"Informal Review" means an internal administrative process to provide a timely resolution of disagreements prior to or in concert with the request for a formal review.

"Mediation" means a dispute resolution process as an alternative to formal Fair Hearing conducted by qualified mediator.

"Representative" means a party selected by an applicant/client and is identified to the USOR in writing as acting as an advocate in their behalf.

"Superintendent's Review" means the procedures established in this chapter for an applicant or client or the USOR to appeal a Fair Hearing decision.

"Supervisor" means any Utah State Office of Rehabilitation VR supervisory staff member.

"Utah State Office of Rehabilitation (USOR)" means the designated state agency for VR services in Utah which operates VR programs under the Division of Rehabilitation Services and the Division of Services for the Blind and Visually Impaired.

21.4 Informing Applicants/Clients

All applicants/clients must be informed of opportunities for appeal as described in this chapter. This information must include the names and addresses of the individuals with whom an appeal is filed. [34CFR 361.57(b)(2)] USOR applicants/clients shall be informed of their opportunity for review of a VR Counselor/supervisor determination at several points during the rehabilitation process. The following outlines when applicants/clients shall be informed of their opportunity for review:

- A. The VR Counselor shall orally, or in a format that is accessible to the applicant/client, inform the individual of opportunities for review of VR Counselor/supervisory determinations at appropriate times during the application process, plan development process, client record closure and at other times decisions are being made concerning the applicant/client.
- B. USOR policy also requires the VR Counselor to inform the applicant/client in writing. The following USOR forms and written communication includes statements informing the applicant/client of opportunities for review of VR Counselor/supervisory determinations:
 - 1. USOR-4, Application
 - 2. USOR- 30 Day Notification Letter
 - 3. USOR- Certificate of Ineligibility Letter
 - 4. USOR - Dear Applicant CAP Letter
 - 5. USOR- Individualized Plan for Employment (IPE)
 - 6. USOR- Closure Statement
 - 7. USOR-74, Initial Contact Report

21.5 Review Processes

The USOR Review of a VR Counselor/supervisory determination procedure provides for a formal mediation and an informal process. Regardless of the appeals process followed administrative costs associated with the appeals process will be borne by the USOR. Costs incurred by an applicant or client retaining a personal attorney and/or unusual travel costs are not considered administrative costs and are the responsibility of that applicant/client. Below is a description of each process to include, as appropriate, applicable time lines.

A. Informal Review Process

USOR utilizes an informal review process if it is likely to result in a timely resolution of disagreements. This process may not be used as a means to delay mediation or a more formal fair hearing before an impartial officer. The intent of the USOR informal review is to provide a timely resolution of disputed VR Counselor/supervisory determinations. Although USOR staff shall encourage applicant/client participation in the informal review process, the applicant/client may at any time choose not to participate in the process and request a formal review (Fair Hearing).

1. Filing for Informal Review

Any applicant/client unable to resolve concerns surrounding a decision with his/her VR Counselor or supervisor may request an informal review of the VR Counselor or supervisor's decision by filing a written request with the Field Service Director under which the disputed determination was rendered. The written request for review shall:

- a. Be prepared by the applicant/client or their designated representative;
- b. Include the name and address of the individual requesting the review;
- c. Include the name of the VR Counselor or supervisor whose decision is to be reviewed;
- d. Describe the decision(s) which the individual is requesting review in sufficient detail to inform the USOR VR Appeals Coordinator of the nature and consequences of the decision(s);
- e. Describe the action or resolution desired; and
- f. Be signed and dated by the individual or his/her representative.

2. Review of Decision

The Field Service Director shall conduct an investigation of each decision being reviewed. The investigation shall be conducted to the extent necessary to assure that all relevant facts are identified and documented. At a minimum the investigation shall include communication with the applicant/client, VR Counselor and relevant supervisory staff. The investigation shall also include a review of the applicant/client record. When conducting the review the Field Service Director may seek assistance from any appropriate USOR Staff as needed.

3. Issuance of Decision

The Field Service Director shall issue a written decision regarding the issues in question within 15 working days from receiving the request for informal review. The decision shall be mailed to the party making the request and other appropriate persons. The decision shall include:

- (a) Notice to the party of the right to administrative review of the decision under this rule;
- (b) A summary of the decision(s) the applicant/client requested to be reviewed;
- (c) Review of the action or resolution desired by the applicant/client;
- (d) A summary of the investigation including all contacts made and materials reviewed;
- (e) Findings of the investigation; and
- (f) Action to be taken and reasons for such action.

If the Field Service Director is unable to reach a decision within the 15 day period, he or she shall notify the individual in writing or in another accessible format suitable to the individual, as to why the decision is being delayed and why an extension is needed. Both parties must agree to the extension of time.

B. Mediation

Federal Statute requires USOR to establish procedures for alternative dispute resolution through mediation.

1. Filing for Mediation

At any time during the review process, the applicant/client may request mediation by filing a written request with the Division Director. An individual does not waive the right to a formal hearing by requesting mediation and the Division Director may recommend mediation in the case of a request for a formal hearing. The request must be received by the Division Director within 30 days of the date on which an informal review decision was rendered and sent to the party making the request. Each request for mediation shall:

- a. Be prepared by the applicant/client or their designated representative;
- b. Include the name and address of the individual requesting the review;
- c. Include the name of the VR Counselor or supervisor whose decision is to be reviewed;
- d. Describe the decision(s) which the individual is requesting be reviewed, in sufficient detail to inform USOR of the nature and consequences of the decision(s);
- e. Describe the action or resolution desired; and
- f. Be signed and dated by the individual, or their representative, filing the request.

2. Process Requirements

The mediation process must:

- a. Be voluntary on the part of the parties involved.
- b. Not be used to deny or delay the right of the individual to a Hearing; and
- c. Be conducted by a qualified and impartial mediator.

3. List and Selection of Mediators

- a. The USOR shall maintain a list of qualified mediators who are knowledgeable in laws (including regulations) relating to the provision of VR services under the Rehabilitation Act as Amended.
- b. Selection of mediators shall be on
 - (i) A random basis or
 - (ii) By agreement between the Executive Director of USOR and the individual, or the individual's representative.

4. Scheduling

The mediation sessions shall be scheduled in a timely manner and be held in a location convenient and accessible to all parties.

5. Agreement

Agreement reached by the parties shall be formalized in a written mediation agreement.

6. Termination of Mediation

Either party may elect to terminate mediation at any time.

7. Confidentiality

Any discussion that occurs during the mediation process is considered confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

8. Construction

Nothing in the mediation process is to be construed to preclude the parties from informally resolving the dispute prior to mediation proceedings or a fair hearing.

C. Formal Review Process

The formal review procedure includes four potential steps: internal review by administration, fair hearing, optional and conditional State Superintendent's review, and appeal to the District Court of Utah.

Step 1 - Internal Review by Administration

Step 2 - Fair Hearing

Step 3 - Review by State Superintendent of Public Education

Step 4 – Appeal to the State District Court

1. Filing for Formal Review

The formal review procedure is initiated when a written request for formal review is received by the Executive Director of USOR. A request shall:

- a. Be prepared by the applicant/client or their designated representative.
- b. Include the name and address of the individual requesting the review.
- c. Include the name of the VR Counselor/supervisor whose decision is to be reviewed.
- d. Describe the decision(s) which the individual is requesting reviewed, in sufficient detail to inform USOR of the nature and consequences of the decision(s).
- e. Describe the action or resolution desired.
- f. Signature and date of the individual or their representative filing the request.

Regardless of when the formal appeal procedure is initiated, a Fair Hearing must be scheduled to take place within 60 days of receipt of the request by the Executive Director unless the parties agree to a specific extension of time. The Fair Hearing must be scheduled by the divisional Client Service Director or their designee under which the request was filed as soon after receipt of the request as possible.

2. A formal review may be cancelled by the individual who requested the review by submitting a written or other format suitable for the individual, request addressed to the Director from the individual or their designated representative.

3. Step 1 - Review by Administration

The Client Service Director or their designee will review the client record in order to clarify the issue(s), continue the resolution process, determine the appropriateness of continuing with the fair hearing process, and prepare for the fair hearing. The review will include, at a minimum, a client record review. The

Client Service Director or designee may also review other relevant data, circumstances, and relevant participants, and communicate with all parties. Within 20 days of the request for a formal review the Client Service Director or designee shall prepare a written summary of the administrative review. Copies of the summary are provided to the Division Director and applicant/client or the representative.

- a. The summary shall include:
 1. Clarification of the issue requested to be heard in the fair hearing.
 2. Clarification of relevant agency policy and procedures.
 3. The administrative decision and its basis.

If the Review by Administration does not result in resolution of the applicant/client dissatisfaction the review process shall move to the Fair Hearing.

TIMELINE: The Review by Administration will take place within 20 days of the initiation of the request for a formal review.

4. **Step 2 - Fair Hearing**

The Fair Hearing is designed to provide a process for a VR applicant/client and agency to submit additional evidence and information to an impartial hearing officer. The Client Service Director shall select an Impartial Hearing Officer to preside at the hearing. The officer shall be selected (1) on a random basis or (2) by agreement between the Client Service Director and the applicant/client or their representative. The impartial hearing officer shall be selected from among a pool of qualified persons identified jointly by USOR and the members of the State Rehabilitation Council.

Qualified persons must:

- (a) Not be an employee of the agency;
- (b) Not have been involved in previous decisions regarding the client/applicant;
- (c) Have background and experience in and knowledge of the delivery of VR services; and
- (d) Have no personal or financial interest that would be in conflict with the individual's objectivity.

The Impartial Hearing Officer's duties include:

- (a) Defining issues prior to the hearing;
- (b) Arranging an orderly presentation of evidence and information relevant to the grievance;
- (c) Ensuring the applicant/client or representative is afforded an opportunity to present evidence, information and witnesses, to be represented by counsel or other advocate, and to examine all witnesses and other relevant sources of information and evidence;
- (d) Render a decision consistent with the approved Utah State Plan, assuring compliance with federal law and regulations governing the VR program; and

- (e) Provide a written report of the findings and grounds for the decision to the USOR Executive Director and the applicant/client and their representative within thirty (30) days of the completion of the hearing.

The Impartial Hearing Officer may permit or require any pleadings which will provide for the fair and efficient conduct of the fair hearing. The Field Service Director who conducted the informal review will represent USOR during the Fair Hearing process. If no informal review was conducted, the divisional Client Service Director will represent USOR during the Fair Hearing process. The VR Counselor/supervisor may be asked to participate in the Fair Hearing and will be notified if they are to attend. Unless the State Superintendent initiates a review, the decision rendered by the Hearing Officer will be final. A copy of the Hearing Officer's decision will be utilized to provide USOR staff with the understanding of the decision and the reasoning behind that decision.

The Fair Hearing Process

Each Fair Hearing will follow, as a basic outline, the following steps to ensure a consistent process in this step of the Formal Review:

- (a) Pre-Fair Hearing Meeting: The Impartial Hearing Officer may upon written notice to all parties conduct a pre-hearing meeting to define issues, establish the details for the presentation of evidence and information, review the fair hearing process, and address any questions or concerns of the parties.
- (b) Pleadings: The Impartial Hearing Officer may permit or require parties to file motions, other pleadings, affidavits, or other materials relevant to the action in order to provide for the fair and efficient conduct of the fair hearing. If requested, such pleadings could include such things as:
 - 1. A statement regarding the purpose of the brief;
 - 2. The issue under which the Fair Hearing is being held;
 - 3. The position of the party presenting the brief;
 - 4. Information the party plans to present;
 - 5. A list of witnesses and a brief summary of their expected testimony; and
 - 6. A statement of the desired outcome from the Fair Hearing.
- (c) Evidence: The Utah Rules of Evidence are not applicable to USOR proceedings. The Impartial Hearing Officer shall make all evidentiary rulings based on (1) the reasonable reliability of the offered evidence; (2) fairness to the parties; and (3) usefulness to the Impartial Hearing Officer in reaching a decision. The Impartial hearing Officer has the sole responsibility to determine the applicability of the hearing rules and the admissibility of evidence.
- (d) Fair Hearing: Conducted by the Fair Hearing Officer, it provides each party the opportunity to present evidence, information and witnesses in support of their position and desired outcome. The Fair Hearing will be conducted in the following order of protocol:
 - e. Opening comments and instruction of Hearing Officer;

- f. Presentation/Testimony of, and witnesses for Applicant/Client and/or their representative;
 - g. Response/Presentation of, and witnesses for USOR and/or their representative;
 - h. Final Response of Applicant/Client and/or their representative;
 - i. Final Response of USOR and/or their representative; and
 - j. Instruction and closing comments of Hearing Officer
- (e) Post Hearing Brief: The Impartial Hearing Officer may, at his or her sole discretion, require the parties to submit post-hearing briefs to provide an opportunity for each party to present additional and final comments and information regarding the dispute and the desired outcome.
- (f) Determination: Within 30 days of the completion of the Fair hearing, the Impartial hearing Officer shall provide the Executive Director and the parties to the hearing with a written report of the findings and grounds for his decision.
- (g) Recording: Pre-hearing and Fair Hearing proceedings will be recorded using a court reporter or digital recording device. A transcript of the proceedings will be provided to the Impartial Hearing Officer and the parties to the hearing as soon as it is available.

TIMELINE: The Fair Hearing will be conducted within 60 days of the receipt of the request if the disagreement has not been resolved, (time frame may be extended if both parties agree and a specific time extension is agreed upon) with a decision being rendered and provided to the Executive Director of USOR within 30 days of the Fair Hearing.

Default for Failure to Appear: If a client fails to appear within 30 minutes of the scheduled start time at either the pre-hearing meeting or the fair hearing without prior notification or explanation the Impartial Hearing Officer at his or her sole discretion, may decide based on the individual circumstances of the case to reschedule the case or dismiss based on the applicant/client's failure to appear. If a case is dismissed by a Hearing Officer for failure to appear or for any other reason the applicant/client may not resubmit a request for a Fair Hearing on the same issue. In such cases the applicant/client would be expected to follow the appeals process that follows.

5. **Step 3 - State Superintendent's Review**

The State Superintendent of Public Education's review is an optional review allowed within the review process. Either party may request review of the Impartial Hearing Officer's decision by the Superintendent by submitting a written request for review **within 10 days** of the Fair Hearing decision. The Superintendent shall issue a notice of intent to review to the parties **within 10 days** of receipt of the party's request. The Superintendent may only review the Impartial Hearing Officer's decisions to determine if based on clear and convincing evidence the Impartial Hearing Officer's decision:

- i. Is arbitrary, capricious, an abuse of discretion, or not supported by substantial evidence; or

- ii. Is contrary to the State Plan; or
- iii. Is in violation of federal statutes or regulations; or
- iv. Does not adequately consider state options in the delivery of services.

If the Superintendent finds the decision meets any of the standards above he/she may overturn or modify the decision, or part of the decision, of the Impartial Hearing Officer. In any case where the Superintendent conducts a review, he/she shall issue a written decision of the review to the parties, including a full report of the findings and grounds for the decision, **within 20 days** of the notification of intent to review.

TIMELINE: Notification of intent of a State Superintendent's review will be given to all parties within 10 days of the mailing of the Fair Hearing determination. A decision will be rendered and provided within 20 days of the notification of intent of the State Superintendent's review.

6. Step 4 – Review by the District Court of Utah

Either party who disagrees with the findings and decision of the State Superintendent of Education has a right to bring a civil action in the District Court of Utah with respect to the matter in dispute.

21.6 Impact on Service Provision

USOR may not suspend, reduce or terminate VR services being provided pending resolution through mediation, informal resolution or a decision by a hearing officer or the State Superintendent unless requested to do so by the individual or their representative or USOR has evidence the services are being obtained through misrepresentation, fraud, collusion or criminal conduct by the individual/representative. Federal Regulations also require USOR to be accountable and to provide specific oversight to guard against fraud, waste and abuse.[34 CFR 361.1; 34 CFR 80.22 (b)] **USOR policy** regarding suspension, reduction or termination of VR services pending resolution or a decision is as follows:

In the event that a VR Counselor/supervisor makes a determination to suspend, reduce or terminate a particular VR service based on evidence that to continue provision of that particular service would constitute fraud, waste or abuse; and that the determination is challenged; that particular VR service may be suspended, reduced or terminated pending resolution or a decision. All other VR services listed on the IPE or otherwise agreed to shall continue to be provided. [34 CFR 361.39]

21.7 Relationship to Other Laws

This procedure does not prohibit or limit the use of remedies under any other Utah State or federal law that provides equal or greater protection.